

SURFACE TRANSPORTATION BOARD

ORDER OF PRESIDING ADMINISTRATIVE LAW JUDGE REGARDING DISCOVERY

Docket No. NOR 42144

NORTH AMERICA FREIGHT CAR ASSOCIATION; AMERICAN FUEL & PETROCHEMICALS MANUFACTURERS; THE CHLORINE INSTITUTE; THE FERTILIZER INSTITUTE; AMERICAN CHEMISTRY COUNCIL; ETHANOL PRODUCTS, LLC D/B/A POET ETHANOL PRODUCTS; POET NUTRITION, INC.; AND CARGILL INCORPORATED v. UNION PACIFIC RAILROAD COMPANY

Decided: October 11, 2016

On October 7, 2016, pursuant to the direction and guidance at the oral argument held on September 20, 2016, GATX Corporation (GATX), Union Tank Car Company (UTC), Trinity Industries, Inc. (Trinity), and American Railcar Industries, Inc. (ARI), the four non-party tank car owners (collectively, the TCOs), have conferred with Union Pacific Railroad Company (UP) and have, for the most part, reached agreement as to disposition of UP's proposed subpoena discovery requests as presented in UP's Revised Petition for Subpoenas dated September 15, 2016.

While the TCOs and UP have reached an agreement as to disposition of UP's proposed subpoena discovery requests, there are three unresolved areas of dispute. Remaining in dispute are (1) the identification of an appropriate number of potential custodians for electronic searches; (2) whether UP should be required to pay the costs of ESI vendors that the TCOs may use to produce electronically searchable information; and (3) whether UP should be required to pay the cost of a logistics support firm. A brief summary of the parties' respective positions as to the remaining areas of dispute is set forth below. The ordering paragraphs memorialize the TCOs' and UP's agreement and resolve the three remaining issues in dispute.

***Custodians***

**TCOs' Position.** TCOs believe the number of custodians was discussed at the hearing and that the directions to TCOs and UP were to keep them very limited, in the area of 2-3 but no more than 5. UP has suggested that "any person with business knowledge" of the topics being searched be included. The TCOs have confirmed that this could mean dozens of custodians and, for the reasons discussed at our last hearing, this would be overly burdensome. TCOs suggest they search those key individuals in the positions most likely to yield responsive information and that the number for each ESI-related request be capped at 5 custodians.

**UP's Position.** Union Pacific substantially limited the scope of its discovery requests to reduce the burdens on TCOs. If TCOs do not collect documents from all custodians they identify as most likely to have non-duplicative, responsive information, they should not be left on their

own to select the custodians. At the hearing, the presumption seemed to be that a search of a reasonable number of custodians would capture those “who are most likely to have [relevant information] because of their management responsibilities.” (Tr. at 63) If a TCO has “dozens” of employees likely to have responsive, non-duplicative information, then searching just five employees selected by the TCOs would not permit effective discovery. We propose a higher initial limit and a good-faith consultation process, similar to the process for ESI searches:

Where searches of ESI are required, the TCOs shall conduct ESI searches of the custodians most likely to have responsive, non-duplicative information because of their business responsibilities. If a TCO identifies more than ten (10) potential custodians for any particular ESI search, the affected TCO and Union Pacific will consult to identify a reasonable number of custodians most likely to have responsive, non-duplicative information. If a resolution is not achieved by agreement the affected TCO and Union Pacific shall have the right to return to the undersigned Administrative Law Judge to seek a resolution of the issue.

27. Where searches of ESI are required, the TCOs shall conduct ESI searches of the custodians most likely to have responsive, non-duplicative information because of their business responsibilities. Where the number of potential custodians exceeds eight (8) for any particular ESI search, the TCOs shall select eight (8) representative custodians most likely to have responsive, non-duplicative information.

### ***ESI Vendor Costs***

**TCOs’ Position.** Most of the TCOs will have to employ an ESI vendor to collect the data from the custodians and to conduct the searches requested by UP. TCOs will act in good faith to use them efficiently but do not believe the cost of having to do so should be visited upon the TCOs. This ESI vendor cost is necessitated by UP’s requests and those costs are exacerbated by UP’s position on the TCO’s having to search dozens of custodians. UP has requested this information (in some detail) and the use of the ESI vendor is necessitated by those requests, and the TCOs believe it is appropriate and reasonable that UP, not the TCOs, pay those costs. The TCOs propose the following:

To the extent a TCO needs utilize an ESI vendor in order to comply with this order, UP shall pay all costs imposed by such entities for such work or information.

**UP’s Position.** The TCOs did not raise this issue at the hearing, and it is not appropriate to raise it now. STB rules provide for non-party discovery, but not shifting of discovery costs; it would be unprecedented. And TCOs are not-typical non-parties. Two of them have paid more under Item 55-C than Cargill, and all have paid more than POET Ethanol and POET Nutrition. As alleged “victim[s]” (TCO 6/20 Reply at 19), they have strong economic interests in the outcome of this case. In similar contexts, courts require non-parties to bear subpoena costs. *Cornell v. Columbus McKinnon Corp.*, 2015 WL 4747260, at \*5(N.D. Cal. Aug. 11, 2015). We have gone far to limit TCOs’ discovery costs by paying for Railinc data, narrowing requests substantially, and limiting many requests to electronic information. TCOs have not provided information about the burdens associated with searching additional custodians. We should not

be required to give TCOs a blank check to cover costs for which they do not even provide an estimate.

***Logistics Support Firm Charges***

**TCOs' Position.** ARI may need to rely on a logistics support firm that it regularly uses in order to compile information in response to Request 2(c). ARI is willing to do so, but would expect to be reimbursed by UP to the extent ARI faces a significant out-of-pocket cost for compiling information that is not regularly compiled in the course of its regular business operations. The TCOs propose the following:

To the extent ARI needs utilize a logistics support firm in order to comply with Section 2(c) of this order, UP shall pay all costs imposed by the logistics support firm for such work or information.

**UP's Position.** ARI never raised this issue at the hearing, and it is not appropriate to raise it now, or to request a blank check. UP is not asking ARI to compile information. If ARI produces data, UP will compile it, if necessary. To the extent the problem is that ARI outsources functions and may incur costs to retrieve data, ARI's business decision to outsource functions performed by employees of other TCOs does not diminish our right to get the data in discovery. *See, e.g., Oriental Trading Co. v. Yagoozon, Inc.*, 2014 WL 4956382, at \*2 (D. Neb. Oct. 1, 2014) ("Yagoozon has a legal duty to obtain these documents from its very close business partner, Amazon," to which Yagoozon claimed to have outsourced certain business functions).

**It is ordered:**

1. No subpoena shall issue, but the TCOs will address and/or respond to UP's revised requests in accordance with this order.
2. Where searches of electronically searchable information (ESI) are required, the TCOs shall conduct such searches and then determine which of the documents returned by these searches are actually responsive to the RFP. Searches assume appropriate "stemming" of search terms utilizing the syntax necessary to the particular search software being utilized. To the extent any search described below yields an excessive number of "hits" or "false positives," the affected TCOs and UP will work to resolve the issue jointly through modification of the search terms or syntax. If a resolution is not achieved by agreement, the TCOs and UP shall have the right to return to the undersigned Administrative Law Judge to seek a resolution of the issue.
3. The TCOs will in good faith classify all documents and information produced in accordance with this order in accordance with the protective order issued in this docket.
4. UP shall pay all costs associated with obtaining data from Railinc with regard to RFPs 2(a), 3 and 4, and all such data shall be shared with complainants and TCOs at no cost to the complainants or TCOs. Data obtained from Railinc does not need to be aggregated.

5. ARI is not required to produce any information for the period before 2011, when it became a tank car owner, but will produce information responsive to RFP 11, including information before 2011, to the extent it exists.

6. Unless otherwise stated, the requests seek documents beginning on January 1, 2001 through the present.

7. Subject to the foregoing, the requests at issue will be addressed as follows:

**RFP 1: Please produce (a) all documents discussing or describing the actual or anticipated impact of Item 55-C, and (b) all communications (other than routine transaction documents) to or from lessees or other car owners regarding Item 55-C.**

8. TCOs will conduct the following ESI search for documents dated December 1, 2014 to present:

("55-C" or "55 C" or 55C or 4703) or (tank! and (UP or "Union Pacific" or UPRR)) and (empty w/15 (mov! or shop or repair or tank! or car) w/15 (charge or tariff or rate or bill! or pay!))

**RFP 2: For the period from 2008-2015, please produce**

**a) documents, by lessee and by car mark, sufficient to show mileage equalization payments to Railinc**

9. TCOs will provide authorization to UP to obtain data responsive to this request from Railinc.

**b) documents, by lessee and by car mark, sufficient to show excess empty mileage charges billed to and collected from lessees, or to show where you have waived billing or collection**

10. The TCOs will provide an annual total excess empty mileage charge billed to and collected from lessees by lessee.

**c) documents, by railroad, sufficient to show empty repair mileage payments to railroads other than UP**

11. The TCOs will provide an annual total empty repair mileage payment amount for each Class I railroad.

**d) documents, by lessee and by car mark, sufficient to show empty repair mileage charges billed to and collected from lessees, or to show where you have waived billings or collection**

12. The TCOs will provide an annual total amount of empty repair mileage charges by lessee.

**e) all studies, analyses, or reports regarding the costs of moving empty tank cars**

13. The TCOs will conduct a reasonable inquiry of persons knowledgeable about the potential existence of documents responsive to this request and produce any documents identified in that inquiry.

**RFP 3: For period from January 1, 2014 through December 31, 2015, please produce documents sufficient to identify each movement of a tank car for which You were the Owner to a Repair Facility, the work performed at the Repair Facility, and the reason for each movement**

14. TCOs will provide authorization to UP to obtain data responsive to this request from Railinc. To assist UP in accessing and utilizing the Railinc data, the TCOs will provide information concerning the arrival and departure dates and locations for repair work for this time period.

**RFP 4: Please produce documents sufficient to show for each car reporting mark, for tank cars for which you were the Owner, separately for each year from 2009 through 2015 . . . .**

15. TCOs will provide authorization to UP to obtain data responsive to this request from Railinc.

**RFP 5: Please produce all contracts with Repair Facilities to which you have directed tank cars since January 1, 2013.**

16. The TCOs will produce these records.

**RFP 6: Please produce all documents discussing Item 55-C or similar charges by other railroads in connection with your instructions to a lessee to direct particular cars to particular repair facilities.**

17. TCOs will conduct the following ESI search for documents dated January 1, 2008 to present:

("55-C" or "55 C" or 55C or 4703 or 71 or 90020! or "99-A" or "99 A" or 99A or 890000! or 8002! or 6175! or 6100! or 4020! or 4006! or 4004! or 4000! or 3700! or 3000! or 395! or 157!) or (("Union Pacific" or UP or UPRR or BNSF or "Canadian Pacific" or CP or CPR or "Canadian National" or "CN" or "Kansas City Southern" or KCS or "Norfolk Southern" or NS or NSR) and tank! and (empty w/15 (mov! or shop or repair or tank! or car) w/15 (charge or tariff or rate or bill! pay!)))

**RFP 7: Please produce all documents (a) consisting of, discussing, or describing plans for retrofitting tank cars; and (b) discussing or describing the actual or anticipated impacts of Item 55-C or similar charges imposed by other railroads on plans for retrofitting tank cars.**

18. TCO's will conduct a reasonable inquiry of persons knowledgeable about the potential existence of documents responsive to subpart (a) of this request and produce any documents identified in that inquiry.

19. TCOs will conduct the following ESI search for documents responsive to subpart (b) of this request for documents dated January 1, 2013 to present:

retrofit! and ((“55-C” or “55 C” or 55C or 4703 or 71 or 90020! or “99-A” or “99 A” or 99A or 890000! or 8002! or 4000! or 3700!) or ((“Union Pacific” or UP or UPRR or BNSF or “Canadian Pacific” or CP or CPR or “Canadian National” or “CN” or “Kansas City Southern” or KCS or “Norfolk Southern” or NS or NSR) and tank! and (empty w/15 (mov! or shop or repair or tank! or car) w/15 (charge or tariff or rate or bill! or pay!))))

**RFP 8: Please produce all documents (other than routine transactional documents and lease agreements) that refer to, relate to, or consist of:**

**a) communications with lessees or potential lessees regarding (i) their ability to negotiate zero-mileage rates, (ii) the practice of negotiating zero-mileage rates, (iii) the obligation of railroads to pay mileage allowances, or (iv) the lease rates you would charge depending on whether lessee negotiates zero mileage rates or rates that include the payment of mileage allowances**

20. TCOs will conduct the following ESI search for documents dated January 1, 2005 to present:

tank! w/35 ((FM or FMPO or (full w/3 (mile! or allowance))) or (ZM or ZMPO or (zero w/3 (mile! or allowance))) or (mileage w/5 allowance))

**b) studies, analyses or reports of (i) the relationship between mileage allowance levels and tank car ownership costs, or (ii) compensation paid by railroads for use of private cars**

21. TCOs will conduct a reasonable inquiry of persons knowledgeable about the potential existence of documents responsive to subpart (b) of this request and produce any documents identified in that inquiry.

**RFP 9: This request was previously resolved via stipulation with Complainants.**

**RFP 10: For the period from 2005-2015, please produce**

**a) all studies, analyses, or reports, other than studies, analyses, or reports related to individual lessees, regarding the cost of owning tank cars, as well as the extent to which those costs are reimbursed by lessees;**

22. GATX, UTC, and ARI will conduct a reasonable inquiry of persons knowledgeable about the potential existence of documents responsive to this request and produce any documents identified in that inquiry. Trinity is not required to respond to this request.

**b) all studies, analyses, or reports, other than studies, analyses, or reports related to individual lessees, regarding the cost of maintaining tank cars, as well as the extent to which those costs are reimbursed by lessees;**

23. GATX, UTC, and ARI will conduct a reasonable inquiry of persons knowledgeable about the potential existence of documents responsive to this request and produce any documents identified in that inquiry. Trinity is not required to respond to this request.

**c) documents sufficient to show your costs of owning tank cars, as well as the extent to which those costs are reimbursed by lessees; and,**

23. The TCOs are not required to respond to this request.

**d) documents sufficient to show your costs of maintaining tank cars, as well as the extent to which those costs are reimbursed by lessees.**

24. The TCOs are not required to respond to this request.

**RFP 11: Please produce all documents that refer or relate to the development of “Lessor Cost” for purposes of the Section 3 of the Agreement approved in Investigation of Tank Car Allowance System, Ex Parte No. 328**

25. GATX, UTC, and ARI will provide authorization to UP to obtain data responsive to this request from Railinc. GATX, UTC, and ARI will provide worksheets and any underlying work papers to the extent that they exist. Trinity is not required to respond to this request.

**RFP 12: Please produce all lease agreements for tank cars you leased to the 35 shippers identified in Attachment A, since January 1, 2001, including all riders and any other documents referenced in or attached to each lease agreement.**

**RFP 13: Please produce documents sufficient to show average lease rate for tank cars, by car type, for cars You leased to Lessees in each month from 2001 through the present, including documents sufficient to show whether those lease rates presumed railroad payments of mileage allowances**

26. In responding to RFP 12 and 13, GATX, UTC, and ARI may either (i) provide average yearly lease rates and leases for nine (9) shippers to be identified by UP from Attachment A, after GATX, UTC, and ARI identify the shippers in Attachment A to which they

lease cars, or (ii) provide leases for the 35 shippers identified in Attachment A for the years 2008 through the present. Trinity is not required to respond to this request.

27. With respect to the identification of an appropriate number of potential custodians for electronic searches: Where searches of ESI are required, the TCOs shall conduct ESI searches of the custodians most likely to have responsive, non-duplicative information because of their business responsibilities. Where the number of potential custodians exceeds eight (8) for any particular ESI search, the TCOs shall select eight (8) representative custodians most likely to have responsive, non-duplicative information.

28. With respect to whether UP should be required to pay the costs of ESI vendors that the TCOs may use to produce electronically searchable information: No more than eight (8) custodians will be searched. This should not impose an undue burden or result in unreasonable cost to the TCOs. Accordingly, the TCO's proposal is rejected.

29. With respect to whether UP should be required to pay the cost of a logistics support firm: TCO's proposal is rejected.

30. This decision is effective on its date of service.

By the Board, John P. Dring, Administrative Law Judge.